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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 SHEKSA M.,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL SECURITY,

11 Defendant.

CASE NO. C19-5370 BAT

12  
13 **ORDER REVERSING AND**  
**REMANDING FOR FURTHER**  
**PROCEEDINGS**

14 Plaintiff appeals the ALJ's decision finding her not disabled. The ALJ found  
15 degenerative disc disease of the cervical and lumbar spine, left knee meniscal tear, right carpal  
16 tunnel syndrome, and a depressive disorder, an anxiety disorder, a personality disorder and post-  
17 traumatic stress disorder are severe impairments; plaintiff has the residual functional capacity  
18 (RFC) to perform light work with additional limitations; and plaintiff has no past relevant work  
but is not disabled because she can perform other work in the national economy. Tr. 43-56.

19 Plaintiff contends the Court should remand the case for an award of benefits because the  
20 ALJ failed to explain why probative evidence was rejected, and misevaluated the opinions of  
21 examining doctor Keith Ly, M.D. and Stephanie Naas, FNPC. Dkt. 10. For the reasons below,  
22 the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further  
23 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

## DISCUSSION

### A. Consideration of Lay Home Care Evidence

Plaintiff argues the ALJ erred by rejecting or by failing to discuss evidence she received 77 hours of home care in January 2017. *See* Opening Brief, Dkt. 10 at 4. She contends this evidence shows she needs help with activities of daily living both in and outside her home and help with behavioral issues such as yelling, screaming, irritability, agitation and cutting when stressed. *Id.* Plaintiff submits this evidence “suggests severe limitations that Plaintiff is dealing with.” *Id.*

The Commissioner argues the Court should reject the argument because (1) plaintiff has failed to show how the ALJ erred, and has failed to demonstrate prejudice; (2) “the ALJ reasoned that the medical evidence of record and Plaintiff’s activities supported a greater level of functioning than suggested by the award of chore service assistance by the state”; and (3) there is no basis to determine how the chore services were arrived at. Dkt. 12 at 3-4.

The ALJ’s decision notes plaintiff received home care but does not explain what weight the records were given. Tr. 51. The Court thus rejects the Commissioner’s second and third arguments as impermissible post hoc arguments. The Court reviews the ALJ’s decision “based on the reasoning and findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 1995). The ALJ gave no reasons to reject the evidence and the Court accordingly cannot adopt the rationale the Commissioner now presents.

However, the Commissioner’s first argument merits close scrutiny. Plaintiff bears the burden of establishing the ALJ harmfully erred. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The Court may deem any argument that is unsupported by explanation or authority as

1 waived. *See Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008) at \* 2  
2 (unpublished opinion) (citing *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d  
3 918, 923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error  
4 waives issue); *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.  
5 2003)). Here, the homecare records indicate, on their face, plaintiff has physical and mental  
6 health limitations that are similar to her testimony about her limitations. Hence the fact plaintiff  
7 did not explicitly explain how the ALJ erred and how she was prejudiced is not automatically  
8 fatal. This is evident because the records, if believed, set forth limitations the ALJ should have  
9 addressed. The ALJ failed to do so and accordingly erred.

10 The error however is harmless. The homecare records are lay records. The ALJ failed to  
11 provide reasons to reject this lay evidence. However, the ALJ rejected plaintiff's testimony about  
12 limitations which are similar to the limitations indicated in lay home care evidence. In specific  
13 the ALJ rejected plaintiff's testimony as unsupported by the medical record and inconsistent with  
14 her activities. Tr. 49, 51. Plaintiff does not challenge these determinations. Because the ALJ  
15 rejected plaintiff's testimony for reasons that are equally relevant to the lay home care evidence,  
16 any error the ALJ may have committed is harmless. *Molina*, 674 F.3d at 1115 (Where ALJ gives  
17 reasons for rejecting claimant's testimony regarding her symptoms that are equally relevant to  
18 the similar testimony of the lay witnesses, and that would support a finding that the lay testimony  
19 was similarly not credible, any error the ALJ committed in failing to address the lay testimony is  
20 harmless.). The Court accordingly affirms the ALJ's determination as to the homecare records.

## 21 **B. Medical and Other Source Evidence**

22 Plaintiff contends the ALJ misevaluated the opinions of Dr. Ly and Ms. Naas, FNPC. The  
23 ALJ must provide specific and legitimate reasons to reject a contradicted medical opinion, such

1 as Dr. Ly's. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). The ALJ must do more than  
2 offer his conclusions; he must also explain why his interpretation, rather than the doctor's  
3 interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). The opinion of a non-  
4 examining doctor cannot by itself constitute substantial evidence that justifies the rejection of the  
5 opinion of either an examining physician or a treating physician. *Gallant v. Heckler*, 753 F.2d  
6 1450, 1456 (9th Cir. 1984).

7 Ms. Naas is a Family Nurse Practitioner. She is therefore not an acceptable medical source  
8 who can give medical opinions for claims filed before March 27, 2017. Plaintiff filed her claim  
9 in 2015 and the ALJ therefore evaluates opinions of other medical sources using the same factors  
10 used to evaluate medical opinions of acceptable medical sources, 20 C.F.R. § 419.927(f), and  
11 must give specific, germane reasons for rejecting opinions from other sources. *Dodrill v.*  
12 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

13 ***I. Dr. Ly***

14 In August 2014, Dr. Ly performed a physical functional evaluation and diagnosed  
15 plaintiff with meniscus tear of the left knee, radiculopathy L-5, S-1 and depression/anxiety. Tr.  
16 1351. He opined plaintiff was "severely limited" and unable to meet the demands of sedentary  
17 work. Tr. 1352. The ALJ rejected Dr. Ly's opinions finding the doctor "did not report any  
18 objective findings to support his opinion other than range of motion testing and MRI" of the left  
19 knee, and that the opinion is inconsistent with treatment records showing in August 2015,  
20 plaintiff could "shop at a flea market and walk more after her car broke down." Tr. 51-52. The  
21 ALJ further noted in February 2016 plaintiff reported she enjoyed walking, plaintiff's knee  
22 condition was treated conservatively, and she did not receive surgery until June of 2016. Tr. 52.  
23

1 Plaintiff argues the ALJ impermissibly substituted his non-medical opinion for the  
2 opinion of the doctor. Dkt. 10 at 5. The ALJ may properly reject a medical opinion that is  
3 conclusory or not supported by relevant medical documentation. *See Meanel v. Apfel*, 172 F.3d  
4 1111, 1113-14 (9th Cir. 1999). Here Dr. Ly opined plaintiff is markedly limited in her ability to  
5 sit, stand, walk, lift, carry, handle, push, pull, reach, stoop, crouch, and communicate, Tr. 1351,  
6 but provided no explanation for how he arrived at these conclusions. Plaintiff argues the ALJ  
7 impermissibly second guessed Dr. Ly's reading of the test results including the MRI. Dkt. 10 at  
8 5. But the implication Dr. Ly's opinions are based upon these results is unsupported because Dr.  
9 Ly did not indicate what supported his opinions about plaintiff's limitations. The Court  
10 accordingly finds the ALJ reasonably rejected Dr. Ly's opinions as unsupported. Because the  
11 ALJ gave a valid reason supported by substantial evidence, even if the other reasons the ALJ  
12 articulated are erroneous, the errors are harmless.

13 **2. Ms. Naas**

14 Plaintiff contends the ALJ erred in discounting opinions contained in a source statement  
15 Ms. Naas prepared in March 2017. Dkt. 10 at 6. The ALJ rejected Ms. Naas' opinions as  
16 inconsistent with treatment notes from November 2017 which indicated plaintiff has "normal  
17 gait, ability to stand without difficulty, normal strength in the claimant's upper and lower  
18 extremities including bilateral grip strength, and intact sensation." Tr. 53. Substantial evidence  
19 does not support the finding. First Ms. Naas did not opine plaintiff had abnormal gait, could not  
20 stand without difficulty, had abnormal strength and sensation. Rather Ms. Nass' March 2017  
21 assessment indicates plaintiff can frequently reach, handle, push and pull, feel, could lift 20  
22 pounds for 1/3 of a work day and could stand, sit and walk with limitations. Tr, 1166-73. Ms.  
23 Naas also indicates radiating pain presents a problem for plaintiff. Tr. 1168, 1169, and Tr. 1171

1 (Plaintiff would have pain even after exerting herself within exertional limits and would reduce  
2 concentration and attention.). One cannot reasonably say that the pain complaints are  
3 inconsistent with plaintiff's ability to stand, walk etc.

4 Second the November 2017 treatment report the ALJ relied upon indicates plaintiff has a  
5 back injury and has back pain and pain running to the outside of her leg and into her foot. Tr.  
6 1466. Plaintiff received "shots" which were not helpful and a "discogram showed disc pain." *Id.*  
7 In the review of systems section, the treatment note states under "musculoskeletal" that plaintiff  
8 has "back pain, neck pain, muscular weakness, muscles cramping, muscular pain, stiffness, joint  
9 pain." *Id.* In the same section under "neurologic" the note states "tingling or numbness, Denies,  
10 incoordination, difficulty concentrating, memory difficulties, loss of balance, tremor, shooting  
11 pain." *Id.*

12 And third, the November 2017 treatment note does not indicate any of the above pain  
13 symptoms are imaginary or inconsistent with any of the other findings noted such as normal  
14 strength, can stand without difficulty, normal grip, etc. In short, substantial evidence does not  
15 support the ALJ finding the November 2017 treatment note contradicts Ms. Naas' March 2017  
16 assessment. The ALJ accordingly erred. The error is harmful because it resulted in a RFC  
17 determination that fails to account for all limitations assessed by Ms. Naas.

## 18 CONCLUSION

19 The Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter  
20 for further administrative proceedings under sentence four of 42 U.S.C. § 405(g). Although  
21 plaintiff requests an award of benefits, the Court finds the record is not fully developed and that  
22 further proceedings would be useful. The Court has affirmed the Commissioner in most respects  
23 and the ALJ must reassess Ms. Naas' opinions which is something the Court declines to do on

1 appeal. Accordingly, on remand, the ALJ shall reassess the opinions of Ms. Naas, develop the  
2 record and redetermine plaintiff's RFC as needed, and proceed to the remaining steps as  
3 appropriate..

4 DATED this 5<sup>th</sup> day of December, 2019.

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7 BRIAN A. TSUCHIDA  
Chief United States Magistrate Judge